Supreme Court, U.S.
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No. 96-770

In the Supreme Court of the United States

OCTOBER TERM, 1996

ACURA OF BELLEVUE, ET AL., PETITIONERS

v.

CYNTHIA A. METZLER, ACTING SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the pendency of an administrative appeal from an agency administrator's initial decision renders that decision nonfinal for purposes of judicial review under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704.

2. Whether an agency administrator's decision is not ripe for judicial review where collection of the penalties imposed by the decision is suspended until the completion of a pending administrative review of the penalties, and where no showing of immediate hardship is made.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 90 F.3d 1403. The opinion of the district court (Pet. App. 20-38) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1996. The petition for a writ of certiorari was filed on October 15, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, generally prohibits the employment, other than by a parent, of any employee under the age of 16 by an enterprise engaged in commerce, other than agricultural and certain entertainment enterprises. See 29 U.S.C. 203(*l*), 212(c), 213(c). The Act also places such a prohibition on the employment of any employee between 16 and 18 years of age "in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being." 29 U.S.C. 203(*l*); see 29 U.S.C. 212(c), 213(c). Pursuant to that statutory authority, the Secretary of Labor has found and declared, inter alia, that "the occupation[] of motor-vehicle driver * * * on any public road [or] highway * * * [is] particularly hazardous for the employment of minors between 16 and 18 years of age." 29 C.F.R. 570.52(a). The Secretary also has provided, however, that that rule does not apply to the operation of an automobile "if such driving is restricted to daylight hours; *provided*, such operation is only occasional and incidental to the minor's employment," the minor has a valid driver's license and has completed a driver education course, and the vehicle is equipped with a seat belt or similar device that the minor has been instructed to use. 29 C.F.R. 570.52(b)(1) (known as Hazardous Occupation Order No. 2). Therefore, to comply with the child labor provisions of the Act, employers must employ individuals 18 years old or older for any job in which driving an automobile is more than "occasional and incidental" to the employment.

2. Petitioners, automobile dealers in western Washington State, each employed minors between 16 and 18 years of age as lot attendants. Pet. App. 6. According to petitioners, the lot attendants' primary duties were to clean the cars and the dealership premises. *Ibid.* Lot attendants' duties also included, however, "moving cars on the dealers' premises, moving cars to different lots, driving to get gas, and transporting customers." *Ibid.*

Following an investigation, the Administrator of the Wage and Hour Division of the Department of Labor issued a Notice of Assessments and Civil Money Penalty to each petitioner in March 1994. The Administrator found that each petitioner had employed minors in a manner contrary to the child labor provisions of the Act, citing specifically the prohibition, in Hazardous Occupation Order No. 2, against minor employees operating motor vehicles on public roads unless such operating is only occasional and incidental to that minor's employment. Pet. App. 7; see also C.A. E.R. 18-21. The Administrator's notices identified each of the minor children employed in violation of the Act and specified the amount of the penalty assessed for each violation, imposing a penalty of one thousand dollars for each 17-year-old, and twelve hundred dollars for each 16-year-old, employed in violation of the Act. Pet. App. 7. The notices also informed each petitioner of its right to file an exception to the determination that any or all of the violations occurred and the procedures for filing such an exception. *Ibid.* The notices specified that, if a request for a hearing was not timely received, "the determination of the Administrator shall become the final and unappealable Order of the Secretary." See, *e.g.*, C.A. E.R. 18.

Petitioners filed timely exceptions to the civil penalty assessments. Pet. App. 7. On April 7, 1994, the Department of Labor notified petitioners that their exceptions had been received and that they would be notified of a date for a hearing before an administrative law judge (ALJ). *Ibid.*; see, *e.g.* C.A. E.R. 13. In September, 1994, the cases were submitted to the Department of Labor's chief ALJ for hearing and a final determination of the violations and the appropriateness of the penalties assessed. Pet. App. 7-8; see, *e.g.*, C.A. E.R. 15-17.

3. Meanwhile, on July 20, 1994, petitioners filed the instant suit, under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, in the United States District Court for the Western District of Washington, against the Secretary of Labor and other federal officials. Pet. App. 7, 22. Petitioners alleged that the Administrator's decision was based on an arbitrary and capricious interpretation of the "occasional and incidental" provision of the Hazardous Occupation Order No. 2, and that the assessment of civil penalties was invalid. *Ibid.* Petitioners sought declaratory and injunctive relief. *Ibid.*

Respondents moved to dismiss the action on various grounds, including petitioners' failure to exhaust administrative remedies, lack of finality of the agency action, and lack of ripeness. Pet. App. 7-8, 22. After initially denying respondents' motion (*id.* at 17-19), the district court, upon respondents' motion for reconsideration, dismissed the action (*id.* at 20-38).[1]

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[1] The district court initially declined to dismiss the case because it concluded that the Act and the Secretary's regulations do not require an agency appeal prior to judicial review. Pet. App. 18 (citing *Darby* v. *Cisneros*, 509 U.S. 137, 144 n.9

The court held that petitioners' filing of exceptions to the Administrator's decision rendered the decision nonfinal under the Secretary's regulations, 29 C.F.R. 580.5,[2] and, therefore, not final for purposes of judicial review under Section 10(c) of the APA. Pet. App. 32.[3]

(1993)). On reconsideration, the district court granted respondents' motion to dismiss on different grounds, finding the agency action to be nonfinal and not ripe for judicial review. *Id.* at 31-32. The court of appeals affirmed on those grounds and did not address whether the Act or regulations mandate an agency appeal prior to judicial review. Respondents maintain that exhaustion of administrative remedies is required under the Act and regulations in the instant case. Petitioners do not present that question for this Court's review, however.

[2] Section 580.5 provides:

Finality of notice.

If the person charged with violation does not, within 15 days after receipt of the notice, take exception to the determination that the violation or violations for which the penalty is imposed occurred, the administrative determination by the Administrator of the amount of such penalty shall be deemed final, and collection and recovery of the penalty shall be instituted pursuant to § 580.19 [*sic*] of this part.

[3] Section 10(c) of the APA, 5 U.S.C. 704, provides:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the

The court also noted that, under the Secretary's regulations,[4] once exceptions are filed, the collection and recovery of penalties is suspended pending a final decision by the ALJ or, if further appeal is taken from the ALJ decision, a final decision by the Secretary. *Id.* at 37. The court emphasized that, because the decision of the Administrator is nonfinal upon the filing of exceptions, "it cannot be said that the Administrator's decision represents the 'definitive' position of the agency or that an obligation has been imposed as a 'consummation' of the administrative process." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-15. The court noted, as a threshold matter, that, because the Fair Labor Standards Act does not itself authorize or preclude judicial review of final agency decisions, such final decisions are reviewable in federal court under Section 10(c) of the APA. *Id.* at 11. The court then held that petitioners' appeal from the

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action meanwhile is inoperative, for an appeal to superior agency authority.

[4] The court cited 29 C.F.R. 580.19 (which does not exist), but appears to have been referring to 29 C.F.R. 580.18, which provides, in relevant part:

> **Collection and recovery of penalty.**
>
> (a) When the determination of the amount of any civil money penalty provided for in this part becomes final under § 580.5 in accordance with the administrative assessment thereof, or pursuant to the decision and order of an Administrative Law Judge in an administrative proceeding as provided in § 580.12, or the decision of the Secretary pursuant to § 580.16, the amount of the penalty as thus determined is immediately due and payable to the U.S. Department of Labor. * * *

29 C.F.R. 580.18(a).

Administrator's decision to an ALJ "renders the initial Administrator's decision nonfinal for purposes of judicial review." *Ibid.*; see also *id.* at 9-11 (quoting 29 U.S.C. 216(e)[5] (addressing the finality of monetary penalties), and 29 C.F.R. 580.5 and 580.18(a) (see notes 2 and 4, *supra*); and citing 29 C.F.R. 580.7, 580.12(c), 580.12(e), 580.16).

The court rejected petitioners' argument that, under Section 10(c) of the APA and *Darby* v. *Cisneros*, 509 U.S. 137 (1993), the filing of a nonmandatory appeal to an ALJ and a request for a hearing before an ALJ does not eliminate or delay their right to seek judicial review. The court pointed to this Court's statement in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), that the language of Section 10(c) has long been construed "not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." Pet. App. 12 (quoting 482 U.S. at 284-285). The court also noted that this Court recently had again cited that interpretation of Section 10(c) with approval in *Stone* v. *INS*, 115 S. Ct. 1537, 1542 (1995). Thus, the court concluded that, under authority of this Court, a motion for reconsideration renders an agency action nonfinal under Section 10(c) of the

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[5] Section 216(e) of Title 29 provides, in relevant part, that "[a]ny administrative determination by the Secretary of the amount of any penalty under this subsection [regarding civil penalties for child labor violations] shall be final, unless * * * the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, and regulations to be promulgated by the Secretary."

APA. It further reasoned that, because there is no qualitative difference between a motion for reconsideration and an appeal to a superior agency authority as in this case, such an "intra-agency appeal to an ALJ, who has *de novo* review of the Administrator's decision, must similarly render the Administrator's decision nonfinal under the APA." Pet. App. 13. The court of appeals explained that this Court's ruling in *Darby* was inapposite because the Court there merely held that an aggrieved party is not required to exhaust nonmandatory administrative remedies; the Court did not address the situation where an aggrieved party has filed an administrative appeal before seeking judicial review. *Ibid.*

The court of appeals also ruled that petitioners' suit is not otherwise ripe for judicial review because the matter is not fit for judicial decision and petitioners' alleged hardship is insufficient to justify a finding of ripeness. Pet. App. 13-15 (applying factors set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967), and *Dietary Supplemental Coalition, Inc.* v. *Sullivan*, 978 F.2d 560 (9th Cir. 1992), cert. denied, 508 U.S. 906 (1993)). The court of appeals relied on the fact that the Administrator's initial decision does not represent the final administrative position because the ALJ will review that decision *de novo*, and the agency thereby has the authority "to consider, change, and eventually finalize its position." *Id.* at 14. The court found that petitioners' alleged financial hardship was insufficient because collection of penalties is stayed pending a final agency decision by the ALJ or the Secretary, the penalties may be reduced or eliminated during the administrative review process, and the possibility of imposition of

further monetary penalties is too speculative to render the matter ripe at this stage. *Ibid.*

In closing, the court expressed the view that its decision also is sound as a matter of policy. The court emphasized that review of the same agency action by two governmental bodies simultaneously would be a waste of government resources and could result in issuance of conflicting rulings, that judicial review could unnecessarily interfere with the agency's authority to change its position during the administrative review process, and that completion of the agency review process might eliminate the need for judicial review. Pet. App. 15.

ARGUMENT

1. a. Petitioners contend (Pet. 7-12) that the court of appeals' ruling conflicts with Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. 704, and this Court's rulings in *Darby* v. *Cisneros*, 509 U.S. 137 (1993), and *Stone* v. *INS*, 115 S. Ct. 1537 (1995). Petitioners argue (Pet. 12) that, under those authorities, the pursuit of optional administrative remedies does not render administrative action nonfinal.

The court of appeals correctly held that the ruling in *Darby* is inapposite here. The *Darby* case did not involve a situation in which the aggrieved party had actually sought further administrative agency review and such action rendered the administrative decision nonfinal under the agency's regulations. Rather, the parties in *Darby* conceded that the agency action was final for purposes of Section 10(c) of the APA. 509 U.S. at 144. The only question before the *Darby* Court was whether federal courts remained free in a case involving final agency action to require exhaus-

tion of optional administrative remedies before reviewing the action under the APA.

Moreover, the *Darby* Court emphasized the conceptual distinctions between the doctrine of exhaustion of administrative remedies, at issue there, and the doctrine of finality, on which the court of appeals relied in the instant case. See 509 U.S. at 144-145. The *Darby* Court also observed that, although Section 10(c) "limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates," federal courts "may be free to apply, where appropriate, other prudential doctrines of judicial administration to limit the scope and timing of judicial review." *Id.* at 146. That observation immediately followed the passage on which petitioners rely (Pet. 10) in contending that exhaustion of mandatory remedies renders an agency action final, regardless of the pursuit of nonmandatory administrative review. Thus, considered in context, the discussion of exhaustion of remedies cannot be read to undermine the *Darby* Court's earlier approving quotation of the passage in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), regarding finality for purposes of Section 10(c) of the APA: "§ 10(c) 'has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review * * *, but *not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal.*'" *Darby*, 509 U.S. at 145 (quoting *Brotherhood of Locomotive Engineers*, 482 U.S. at 284-285) (emphasis added in part).

The Court's recent decision in *Stone* v. *INS* also demonstrates that *Darby* did not undermine the valid-

ity of that longstanding judicial construction of Section 10(c). The *Stone* Court again quoted the pertinent passage from *Brotherhood of Locomotive Engineers* (see 115 S. Ct. at 1542), setting forth that "construction of the APA language," without any indication that the construction had been, or should be, rejected. The *Stone* Court simply observed that, because the case before it concerned judicial review under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, it was not presented with the question "whether an agency subject to either the APA or the Hobbs Act [the judicial review statute at issue in *Brotherhood of Locomotive Engineers*] has the authority to specify whether the finality of its orders for purposes of judicial review is affected by the filing of a motion to reconsider." 115 S. Ct. at 1543. The *Stone* Court nowhere suggested that its decision in *Darby* had construed Section 10(c) in a manner inconsistent with the Court's longstanding interpretation quoted in *Brotherhood of Locomotive Engineers* and in *Stone* itself.

b. Contrary to petitioners' suggestion (Pet. 12-13), this case does not present a conflict among the courts of appeals warranting review by this Court. The cases cited by petitioners as conflicting with the ruling below predate the Court's decisions in *Brotherhood of Locomotive Engineers*, *Darby*, and *Stone*. See Pet. 13-14. The courts of appeals have recognized that those earlier lower court cases are no longer persuasive. See *United Transportation Union* v. *ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989) (observing that the ruling in *American Trucking Ass'ns, Inc.* v. *ICC*, 697 F.2d 1146 (D.C. Cir. 1983), does not survive *Brotherhood of Locomotive Engineers*); *West Penn Power Co.* v. *United States Envtl. Protection*

Agency, 860 F.2d 581, 587 (3d Cir. 1988) (concluding that the reasoning in *American Trucking Ass'ns* and *Northside Sanitary Landfill, Inc.* v. *Thomas*, 804 F.2d 371 (7th Cir. 1986), "is no longer persuasive in light of the Supreme Court's interpretation of section [10(c)] in *Locomotive Engineers*"). As petitioners acknowledge, the lower court opinions they cite that have been issued subsequent to *Brotherhood of Locomotive Engineers* are in accord with the ruling below. Pet. 13-14 (citing *Winter* v. *ICC*, 851 F.2d 1056, 1062 (8th Cir.), cert. denied, 488 U.S. 925 (1988); *West Penn Power*, 860 F.2d at 582-583).

2. Petitioners contend (Pet. 14-19) that the court of appeals also erred in concluding that their claim is not ripe for judicial review. They assert (Pet. 15) that the court's ruling is only "another way of saying," erroneously in their view, that their request for reconsideration rendered the agency action nonfinal. Petitioners maintain (Pet. 15-19) that the case is ripe for judicial review under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), because the Administrator's decision was a definitive statement of the agency's position and had an immediate impact on petitioners.

The court of appeals correctly ruled that, under *Abbott Laboratories* and *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), petitioners' claim is not ripe for judicial review. The Administrator's notices of determination of penalty constituted only the initial decision of the agency. Upon petitioners' filing of exceptions to the notices, the notices were given only "the effect of a complaint" for purposes of the administrative proceeding, and petitioners' exceptions and requests for hearings were given the effect of an answer to the complaint. See 29 C.F.R. 580.10. The

ALJ is required to conduct a *de novo* review of all the factual and legal issues in the case. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 244-245 (1980). Thus, the court of appeals properly characterized the challenged Administrator's decision in this case as an "interim determination" that initiated an administrative review process, through which the agency would "finalize its position." Pet. App. 14; see *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 238 (1980) (agency's issuance of a complaint is not final agency action for purposes of Section 10(c) of the APA).

Petitioners' claim that the agency action already had an immediate, adverse effect on them because they were required to terminate certain employees is insufficient to render the case ripe for review. That claim focuses on the hardship suffered by third parties, not by petitioners, as required by this Court's ripeness doctrine. See Pet. App. 15. Petitioners concede (Pet. 19) that the sanctions imposed directly on them, *i.e.*, the civil penalties, have had no immediate effect because petitioners have not yet paid the penalties (and need not pay them until the agency action becomes final, see 29 C.F.R. 580.18).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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